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Malewicz v. City of Amsterdam 362 F. SUPP. 2D 298 (D.D.C. 2005)

James Drysdale

CASE SUMMARIES

MALEWICZ V. CITY OF AMSTERDAM

362 F. Supp. 2d 298 (D.D.C. 2005)

I. INTRODUCTION

In *Malewicz v. City of Amsterdam*, the United States District Court for the District of Columbia was asked to determine ownership of a collection of artwork by Kazimir Malewicz.[1] The artist's heirs presented a claim of expropriation against the City of Amsterdam, which, at the time, had housed the Malewicz collection at its Stedelijk Musuem since 1956.[2] In 2003, while fourteen of the works in question were on loan from the Stedelijk to two museums in the United States, the Malewicz heirs filed suit in the District of Columbia seeking return of the artwork and damages.[3]

The district court first sought to determine whether it had jurisdiction to hear the case in accordance with the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 et seq.[4] The Malewicz heirs averred that under Section 1605(a)(3) of the FSIA, a party could bring suit "against a foreign sovereign when (1) rights in property were taken in violation of international law, (2) the property is present in the United States, and (3) the property has a connection to a commercial activity in the United States conducted by a foreign state."[5] The court considered each of the three prongs of the FSIA section in turn. First, the court deemed it unnecessary to determine whether rights in property were taken in violation of international law, observing that any "substantial and non-frivolous" claim provided a basis for consideration of

1. Malewicz v. City of Amsterdam, 362 F. Supp. 2d 298 (D.D.C. 2005).
2. *Id.* at 302.
3. *Id.* at 300.
4. *Id.* at 306.
5. *Id.*

jurisdiction.[6] Next, the court concluded that by filing a claim of ownership while the artwork was on display in the United States, the heirs had sufficiently established "presence in the United States," notwithstanding the fact that the paintings and drawings had been returned to Amsterdam by the time the case was heard.[7] Finally, the court found that Amsterdam's loan of the artwork was "commercial activity," but stated that the record was insufficient to determine whether the City's contacts with the United States were sufficient to subject it to FSIA jurisdiction.[8]

Accordingly, the court denied the City's motion to dismiss and ordered further development of the record to determine whether the loan of cultural and educational artworks constituted substantial contact between the City of Amsterdam and the United States within the meaning of 28 U.S.C. § 1603(e).[9]

II. BACKGROUND

After exhibiting over 100 works of art in Berlin in 1927, Kazimir Malewicz[10] entrusted his canvases to several friends in Germany for safekeeping and storage.[11] The art could not safely be returned to Russia because of a Stalinist condemnation of abstract art.[12] Malewicz died in May of 1935.[13] By 1937, the Malewicz works would not have been acceptable for display to the governments of either Russia or Germany.[14] Therefore, the Malewicz works were shipped to one Mr. Haring for storage in Berlin, Germany.[15] Between the years 1951 and 1956, the director of the Stedelijk Museum in Amsterdam, as well as other museum

6. *Id. at* 306-07 (citing Crist v. Republic of Turkey, 995 F. Supp. 5, 10-11 (D.D.C. 1998)).

7. *Malewicz,* 362 F. Supp. 2d at 311.

8. *Id.* at 314-15.

9. *Id.* at 316.

10. Kazimir Malewicz is a world-renowned Russian artist. He worked in the years prior to World War II and was a significant influence in the history of abstract art. *Id.* at 301.

11. *Id.*

12. *Id.*

13. *Malewicz,* 362 F. Supp. 2d at 301.

14. *Id.*

15. *Id.*

directors, tried to persuade Haring to send the Malewicz Collection to the Stedelijk for restoration and exhibition.[16] Haring refused to do so and repeatedly emphasized that he was only responsible for safekeeping of the canvasses and had no right to convey ownership of them to anyone.[17] In February 1956, Haring finally agreed to lend the works to the Stedelijk.[18]

A letter sent to the Stedelijk, dated June 23, 1956, signed "on behalf" of Haring but not by him, announced that under German law, ownership of the Malewicz works had passed to Haring in 1955.[19] The letter also stated that Haring possessed a notarial exposition of his acquisition of ownership based on a purported gift *causa mortis* by Malewicz to Haring of the works left in Berlin.[20] Therefore, the letter concluded, Haring had the power to sell the works to Amsterdam.[21] In reliance on the letter, the City of Amsterdam entered into a loan contract with Haring in November 1956 that contained an option to purchase the Malewicz Collection.[22] The City claimed to have exercised that option in 1958.[23]

The Malewicz heirs filed suit alleging that the letter was fraudulent and was known as such by the director of the Stedelijk because of his prior conversations with Haring.[24] Further, the heirs alleged that Amsterdam and the Stedelijk concealed the nature of the acquisition, claiming that both knew Haring had no authority to convey title, had consistently denied such authority, and had never claimed that Malewicz intended to transfer the collection to him upon death.[25] The heirs first asked Amsterdam to return the collection to them in 1996.[26] The City responded that its acquisition of the Malewicz Collection was valid and that it had

16. *Id.*
17. *Id.*
18. *Id.* at 302.
19. *Malewicz,* 362 F. Supp. 2d at 302.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 303.
24. *Id.*
25. *Malewicz,* 362 F. Supp. 2d at 303.
26. *Id.*

become the owner of the Malewicz Collection in 1958.[27] Even if this were not so, the City continued, it nevertheless became the owner on January 1, 1993, through acquisitive prescription in accordance with the Dutch Civil Code.[28]

In 2003, fourteen of the eighty-four pieces in the Malewicz Collection were exported to the United States to be part of a temporary exhibition of artwork at the Solomon R. Guggenheim Museum in New York City and the Menil Collection in Houston.[29] These exhibitions were arranged under the terms of the Mutual Educational and Cultural Exchange Program[30] administered by the U.S. Department of State.[31] Pursuant to the terms of § 2459 of the State Department's exchange program, the artworks were immune from seizure and other forms of judicial process that might have had the purpose or effect of depriving the Guggenheim or the Menil Collection (or any carrier) of custody or control of the artworks while in the United States.[32] The Malewicz heirs filed a complaint two days before the Houston exhibit closed.[33] The artwork was returned to Amsterdam as scheduled, prior to the City being served with notice of the Malewicz' complaint.[34] In response to the complaint, the City filed a motion to dismiss.[35]

III. LEGAL ANALYSIS

As a preliminary matter, the court noted that the burden of establishing jurisdiction fell upon the plaintiff.[36] The court also recognized the Foreign Sovereign Immunity Act ("FSIA") as the exclusive means of exercising jurisdiction over foreign sovereigns (the City of Amsterdam qualified as a foreign sovereign).[37] Next,

27. *Id.*
28. *Id.*
29. *Id.*
30. 22 U.S.C. § 2459 (2005).
31. *Malewicz,* 362 F. Supp. 2d at 303.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 305.
37. *Malewicz,* 362 F. Supp. 2d at 306.

the district court stated that a motion to dismiss, when based on a claim of foreign sovereign immunity, provides protection from suit and not merely a defense to liability.[38] Thus, the court found that Amsterdam would be immune from the jurisdiction of the courts of the United States unless one of the FSIA statutory exceptions applied to the present case.[39] The Malewicz heirs relied upon an exception that "allows a suit against a foreign sovereign when (1) rights in property were taken in violation of international law, (2) the property is present in the United States, and (3) the property has a connection to a commercial activity in the United States conducted by the foreign state."[40] The City of Amsterdam moved to dismiss, arguing that none of the three factors of the § 1605(a)(3) exception could be satisfied. The court noted that the City bore "the burden of proving that the plaintiff[s]' allegations [did] not bring [their] case within a statutory exception to immunity."[41] In considering its jurisdiction, the court analyzed each of the three criteria of FSIA § 1605(a)(3) in turn.

A. Were Rights in Property Taken in Violation of International Law?

1. Clearly Inadequate Remedies

The City argued that the Malewicz heirs could not claim an expropriation in violation of international law in the district court because they had failed to exhaust their remedies in the courts of the Netherlands.[42] The court noted that a claimant cannot complain that a taking violates international law unless the claimant has "exhausted domestic remedies in the foreign state that is alleged to have caused the injury."[43]

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38. *Id.*

39. *Id.*

40. *Id.* (quoting 28 U.S.C. § 1605(a)(3)).

41. *Id.* at 306 (quoting Phoenix Consulting Inc. v. Republic of Angola, 216 F.3d 36, 40 (D.C. Cir. 2000)).

42. *Id.*

43. *Malewicz,* 362 F. Supp. 2d at 307 (quoting Millicom Int'l Cellular v. Republic of Costa Rica, 995 F. Supp. 14, 23 (D.D.C. 1998)).

The Malewicz heirs countered by arguing that exhaustion of local remedies was not required, because remedies available in the courts of The Netherlands were clearly inadequate.[44] The heirs argued that the statute of limitations would be a complete defense if the action were brought in the Netherlands, and the case should not be dismissed where an alternate forum (a Dutch court) would not provide an adequate remedy.[45]

The court agreed that an alternative forum in which the plaintiff could recover *nothing* for a valid claim would not be adequate.[46] The court held that were the Dutch statute of limitations to bar plaintiff's claims, Dutch courts would not be a valid alternative forum.[47] The court noted that under the laws of the District of Columbia, it could not require the plaintiffs to take their case to a Dutch court unless the City of Amsterdam waived its statute-of-limitations defense and the Dutch court accepted that waiver.[48] However, the court concluded that the record was factually insufficient to determine when the Dutch statute of limitations had begun to run, and whether it would ultimately bar Plaintiffs' claims.[49]

2. State Denial of Responsibility

The Malewicz heirs argued that they were not required to file suit in the Dutch courts because the City "denied any responsibility."[50] The court summarily dismissed this argument by stating, "[a]lthough the City of Amsterdam has denied that it violated the rights of the Malewicz Heirs, it does not deny

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44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 308 (citing Mills v. Aetna Fire Underwriters Ins. Co., 511 A.2d 8, 13 (D.C. 1986)).
49. *Malewicz,* 362 F. Supp. 2d at 308.
50. *Id.* The heirs relied on the proposition that "local exhaustion of remedies does not apply 'when the claim is for injury for which the respondent state firmly denies responsibility.'" *Id.* (quoting McKesson Corp. v. Islamic Republic of Iran, No. 82-220, 1997 U.S. Dist. LEXIS 8903, at *53 n.25 (D.D.C. June 23, 1997)(*aff'd in part & rev'd in part*, 271 F.3d 1101 (D.C. Cir 2001)).

'responsibility' for the acquisition of the Malewicz Collection."[51] The district court found that the City had not denied responsibility for its actions, but rather the alleged illegality of those actions.[52]Therefore, the court held that if the alternative forum were available, the state "denial" of illegality would not be sufficient to preclude requiring the heirs to exhaust local remedies.[53] While the court's analysis on this point was brief, it clearly distinguished the denial of responsibility from the denial of illegality.[54]

B. Was The Property Present in the United States?

1. Physical Presence

The City of Amsterdam argued that the artwork was not "present in the United States" as a matter of fact when the City was served.[55] Amsterdam likened FSIA § 1605(a)(3) to an *in rem* action, arguing that "jurisdiction in an *in rem* action vests only upon assertion of judicial authority over the *res* and not upon the filing of opening papers."[56] Thus, the City averred that because authority over the *res* could not be obtained by seizure due to the Immunity from Seizure Act, such authority could not be "regarded as equivalent to the particular service of process in the courts of law and equity."[57]

The court disagreed with Amsterdam's argument, stating that it ignored the "history and purpose of FSIA."[58] According to the court, the State Department adopted a "restrictive theory" of sovereign immunity in 1952, whereby a sovereign acting "with regard to sovereign or public acts (*jure imperii*) of a state" would be granted immunity, but no immunity would be recognized "with

51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Malewicz,* 362 F. Supp. 2d at 309.
56. *Id.*
57. *Id.* (quoting Taylor v. Carryl, 61 U.S. 583, 590 (1857)).
58. *Id.*

respect to private acts (*jure gestionis*)."[59] Because of inconsistent standards in applying restrictive theories of sovereign immunity between the Executive and Judicial Branches, the court stated, Congress passed FSIA in 1976 to place "primary responsibility for interpreting and applying FSIA standards in the Judiciary."[60] The district court found that FSIA intentionally overrode the common-law requirement that a plaintiff obtain *in rem* jurisdiction before suit could be filed against a foreign sovereign.[61]

In applying the aforementioned reading of the "history and purpose" of FSIA, the court stated it "would be anomalous to re-insert the jurisdictional requirements of an *in rem* action when Congress so clearly intended to remove them from consideration."[62] Accordingly, the court held that the Plaintiffs' filing of the complaint while the artworks were physically present in the United States was sufficient to meet the "present in the United States" factor of FSIA without regard to later service of the complaint.[63]

2. *Legal Presence*

Amsterdam also argued that the artwork was not present in the United States as a matter of law during the course of the exhibitions.[64] The Malewicz heirs could not seek to seize the artworks while they were in United States due to § 2459 immunity.[65] Moreover, the plaintiffs did not contend that they could have filed the FSIA suit prior to the importation of the works or following their departure.[66] The court acknowledged that the "Plaintiffs [used] the window of opportunity afforded by the Malewicz exhibitions as the jurisdictional hook for their claims."[67]

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59. *Id.* (quoting Verlindin B. V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983)).
60. *Id.*
61. *Malewicz,* 362 F. Supp. 2d at 309.
62. *Id.*
63. *Id.*
64. *Id.* at 309.
65. *Id.* at 310; *see supra* text accompanying notes 31-32.
66. *Id.*
67. *Malewicz,* 362 F. Supp. 2d at 310 (quoting U.S. Statement at 4).

The United States, as an interested party, argued that "§ 1605(a)(3) of FSIA requires a sufficient nexus with the United States to provide fair notice to foreign states that they are submitting themselves to U.S. jurisdiction and abrogating their sovereign immunity."[68] However, the district court found the connection under § 1605(a)(3) to indicate that a foreign state carrying on a commercial activity in this country and not conducting itself as a sovereign was subject to the exception.[69]

The City argued that the fourteen Malewicz works were protected from judicial process by § 2459 and therefore not present in the United States for legal purposes.[70] However, the court found that granting immunity under § 2459 and establishing jurisdiction for certain claims against a foreign sovereign pursuant to § 1605(a)(3) were "both clear and not inconsistent with one another."[71] As such, the court noted it was bound to the plain meaning of the statutes.[72] The court approved the reading of the statutes offered by the Malewicz heirs; specifically, the court held that the two statutes were "unrelated except that a cultural exchange might provide the basis for contested property to be present in the United States and susceptible, in the right fact pattern, to a FSIA suit."[73] The district court reasoned that a litigant with a claim against a foreign sovereign may *not* seize that sovereign's property that is in this country on a cultural exchange and may *not* serve the receiving museum with judicial process as to interfere with physical custody or control of the works.[74] The court stated that the Malewicz heirs had attempted neither.[75]

Accordingly, the court held that the absence of the artworks from the United States might make a court order to return the works to the Malewicz heirs "only as valuable as their ability to persuade a Dutch court to enforce it but, because of § 2459, the

68. *Id.* (quoting U.S. Statement at 6-7).
69. *Id.* at 310-11.
70. *Id.* at 311.
71. *Id.*
72. *Id.*
73. *Malewicz,* 362 F. Supp. 2d at 311.
74. *Id.*
75. *Id.*

presence or absence of the property made no difference during the litigation, as long as it was present when [the] suit was filed."[76] Thus, the court held that the artworks were "present in the United States" for purposes of FSIA jurisdiction.[77]

C. Was There Commercial Activity by the Foreign State?

The Malewicz heirs' complaint stated that the fourteen Malewicz pieces were in the United States in connection with a commercial activity carried on in the United States by Amsterdam.[78] The United States, in a statement filed as an interested party, advised that "the possibility that such a minimal level of contact will necessarily suffice to provide jurisdiction threatens to chill the willingness of sovereign lenders to participate in the section 2459 program."[79] The City also protested that it was merely a "lender from a distance" and not engaged in commercial activity in the United States.[80]

To begin its analysis, the district court cited the Supreme Court holding in *Republic of Argentina v. Weltover, Inc.*, "[b]ecause the [Foreign Sovereign Immunity] Act provides that the commercial character of an act is to be determined by reference to its 'nature' rather than its 'purpose,' the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in 'trade and traffic or commerce.'"[81] Thus, the district court reasoned, if an act is something only sovereigns do, it is not "commercial," and similarly, if an act is something that a private person or entity can do, it is not "sovereign"; therefore, "'commercial' means only 'not sovereign.'"[82]

With this understanding, the court held that it was clear the City of Amsterdam engaged in "commercial activities" when it loaned

76. *Id.* at 311-12.
77.
78. *Id.* at 312.
79. *Id.*
80. *Malewicz,* 362 F. Supp. 2d at 312.
81. *Id.* at 313 (citing Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992)).
82. *Id.*

the fourteen Malewicz works to museums in the United States since "[t]here is nothing 'sovereign' about the act of lending art pieces, even though the pieces themselves might belong to a sovereign."[83]

Amsterdam and the United States argued that the City's contacts with the United States were too insubstantial and insufficient to expose it to FSIA jurisdiction.[84] They both contended that the possibility that such a minimal level of contact would necessarily suffice to provide jurisdiction threatened to chill the entire international exchange program.[85]

The district court found that the existing record did not permit the Court to ascertain the substantiality of the City's contacts or activities with or in the United States in connection with the loan of the Malewicz artworks.[86] The court posed a number of questions that would factor into a calculus of substantiality in this case: (i) "whether apart from the presence of the artworks themselves, what were the terms of the loan agreements"; (ii) "did the Stedelijk send any representatives to this country to work out arrangements, to travel with the art, or to oversee its safety and display"; and (iii) "what consideration did the Guggenheim or Menil Collection offer for the loan—money, a future loan of American art to The Netherlands, a share in any receipts from visitors, catalogue sales, and the like—or was this only a courtesy between professionals in the art world, as the City argues."[87] Prior to making any determination as to jurisdiction, the court deemed it necessary to obtain additional information regarding the extent and the nature of the City of Amsterdam's contacts with the United States.[88] Accordingly, the court deferred making a jurisdictional determination, requesting further development of the record.[89]

83. *Id.*
84. *Id.* at 315.
85. *Id.*
86. *Malewicz,* 362 F. Supp. 2d at 315.
87. *Id.*
88. *Id.*
89. *Id.* at 315-16.

IV. CONCLUSION

The court denied the City of Amsterdam's motion to dismiss so that the record evidence could be developed relating to the city's contact with the United States. The court also instructed development regarding the first prong of its FSIA § 1605(a)(3) concerns, namely, whether the Netherlands would waive its statute of limitations defenses as to provide an alternative forum for the litigation.

James Drysdale